UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOHN OLIVEIRA Plaintiff,	:	
v.	:	C.A. No. 02-383 ML
MARK SALES and Co Employee NANCY E. GIORGI, Defendants.	:	

MEMORANDUM AND ORDER
GRANTING DEFENDANTS' MOTION
TO QUASH DEPOSITIONS NOTICE

This is an action brought pursuant to 42 U.S.C. § 1983. See Complaint at 1. Plaintiff, proceeding pro se, alleges that Defendants, public officials of the Town of Bristol, Rhode Island ("Town"), used their authority to violate, among other constitutional rights, his right to equal protection and due process of law. See id. at 2. Plaintiff claims that Defendant Mark Sales, the Town's Municipal Court Judge ("Judge Sales"), and Defendant Nancy E. Giorgi, the Town's Assistant Solicitor ("Attorney Giorgi"), (collectively "Defendants") conspired "to use [the] municipal court in an arbitrary capricious unrestrained manner." Id. at 1. Plaintiff also alleges that Judge Sales allowed town officials to cite Plaintiff for violating sections of the Rhode Island State Building Code which were inapplicable and that Judge Sales arraigned Plaintiff without a signed complaint. See id.

Before the court is Defendants' Motion to Quash Depositions Notice ("Motion to Quash"). Defendants seek to avoid their scheduled depositions which Plaintiff noticed for January 22, 2003 (Attorney Giorgi), and January 24, 2003

(Judge Sales). For the reasons which follow, the court grants the Motion to Quash.

Facts and Travel

In April of 2002, Defendants notified Plaintiff that he was in violation of the Town's zoning ordinance which regulated open air storage and also of the State Building Code. See Defendants' Memorandum of Law in Support of Motion for Summary Judgment ("Defendants' Summary Judgment Mem."), Exhibit ("Ex.") A (Letter from Jack Evans, Code Compliance Coordinator, and Gerhard Oswald, Zoning Enforcement Officer, to Plaintiff of 4/10/02). As a result of this notice, Plaintiff appeared in the Municipal Court and contested the violations. See id. at 2. He requested that the Town provide him with copies of documents relating to his property and the cited violations. See id. Although the Town claims that it complied with Plaintiff's request, see id., Plaintiff maintains that Town officials did not respond to his request for copies of documents, see Plaintiff[']s] Memorandum of Law Objection to Defendants' Motion to Quash Depositions Notices in the related case of Oliveira v. Evans, et al., C.A. 02-303 T, at 3. Ultimately, the violations were dismissed. See Defendants' Summary Judgment Mem., Ex. B (Order of the Municipal Court of the Town of Bristol regarding Notice of Violation dated April 10, 2002, against Plaintiff).

The present action was filed on August 9, 2002, in the state Superior Court. Defendants removed the case to this court on August 30, 2002, citing 28 U.S.C. § 1331 which gives federal district courts original jurisdiction of all cases arising under the Constitution, laws, and treaties of the

United States. See 28 U.S.C. § 1331 (2000). Plaintiff objected to the removal and filed a motion to remand the case to the Superior Court. On October 8, 2002, District Judge Mary Lisi denied the motion to remand. Plaintiff subsequently filed a motion for an enlargement of time to amend his complaint. This motion was denied without prejudice by this Magistrate Judge in an order entered on November 14, 2002. See Order Denying Without Prejudice Motion for Enlargement of Time dated 11/14/02.

Defendants filed a Motion for Summary Judgment on December 13, 2002. Plaintiff responded on December 19, 2002, by filing a Motion to Stay in both this case and in C.A. 02-303T. The Motion to Stay bore the caption of both cases. Judge Lisi denied the Motion to Stay, but granted Plaintiff a thirty day extension to file his response to the Motion for Summary Judgment in C.A. 02-383ML. The Order which granted the extension was written on the face of the Motion to Stay. On January 7, 2003, Plaintiff filed a motion for a written decision. Although it is not entirely clear, apparently Plaintiff seeks a written decision from Judge Lisi for her denial of his motion to remand the case to the Superior Court.[1]

The instant Motion to Quash was filed on January 9, 2003. A hearing on the Motion to Quash was held on January 13, and the court temporarily stayed the taking of Defendants' depositions, pending the issuance of this Memorandum and Order.

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[1] On October 8, 2002, Judge Lisi denied Plaintiff's motion to remand the action to superior court by endorsing on the face of the motion: "Denied for the reasons set forth in Defendants' Memorandum in Opposition." Order dated 10/8/02 (Lisi, J.).

Discussion

In support of their Motion to Quash, Defendants argue that "they are entitled to absolute judicial and prosecutorial immunity from plaintiff's suit." Defendants' Memorandum of Law in Support of Motion to Quash Depositions Notice ("Defendants' Mem.") at 2. They argue that such immunity affords an immunity from suit, not just immunity from liability. See id. (citing Hunter v. Bryant, 502 U.S. 224, 227-28, 112 S.Ct. 534, 536, 116 L.Ed.2d 589 (1991)(per curiam)).[2] Contending "that because the pending motion for summary judgment is based upon a pure legal issue, there is no discovery plaintiff could otherwise obtain from the depositions," id., Defendants ask that the Motion to Quash be granted.

Plaintiff first contends that Hunter v Bryant is not on point. He states that the case does not address a "Municipal Judge arraigning ... Plaintiff with out a Formal Complaint and no plaintiff[] or prosecutor in the court room ...." Plaintiff['s] Objection to Defendant[s] Motion to Quash Depositions Notice ("Plaintiff's Mem.") at 2. As part of this first argument, Plaintiff asserts that there was no formal complaint issued by an authorized officer or official of the Town and that this omission violated the Rhode District Court Civil Rules which the Town was obligated to follow. See id. (citing Ex. A (copy of Sec. 2-215, presumably of Town Ordinances)).

As a second argument, Plaintiff disputes that Gomez v. City of Nashua, 126 F.R.D. 432, 435 (D.N.H. 1989), a case cited by Defendants in their memorandum, see Defendants' Mem.

[2] Full citation by court.

at 2, is authority for the proposition that Attorney Giorgi is immune from suit for "threaten[ing] to prosecute 72 year old [Plaintiff] in Municipal Court for Refus[ing] to sign Giorgi Voluntary Dismissal or [for] ma[king] fraud[ulent] statement in Federal Court." Plaintiff's Mem. at 3. Plaintiff also cites a number of cases in support of his contention that Defendants are not protected by immunity in this action.

The fact that Hunter v. Bryant does not address the precise factual situation presented by the instant case is not determinative of the issue presently before the court. The issue is whether Plaintiff should be allowed to depose Defendants who contend that they are immune from suit.

There is ample authority that judges are absolutely immune for their judicial acts. See Mireles v. Waco, 502 U.S. 9, 11, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991)("[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages."); Dennis v. Sparks, 449 U.S. 24, 27, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980)("[T]his court has consistently adhered to the rule that judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities.")(internal quotation marks omitted); Stump v. Sparkman, 435 U.S. 349, 355-56, 98 S.Ct. 1099, 1104, 55 L.Ed.2d 331 (1978)("[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."); Slotnick v. Garfinkle, 632 F.2d 163, 166 (1st Cir. 1980)("Except where judges act completely without jurisdiction, they are protected from liability under section 1983 by the well- established doctrine of judicial immunity.); Slotnick v. Staviskey, 560 F.2d 31, 32

(1st Cir. 1977)("state court judge enjoys absolute immunity from suit under § 1983").

The First Circuit in Cok v. Cosentino, 876 F.3d 1 (1st Cir. 1989), affirmed on the basis of judicial immunity the dismissal of claims brought against a family court justice, a guardian ad litem, and a conservator by a disappointed litigant in a divorce proceeding.

> There is no question that [the Family Court Judge] was protected by absolute immunity from civil liability for any normal and routine judicial act. Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 1104-05, 55 L.Ed.2d 331 (1978). This immunity applies no matter how erroneous the act may have been, how injurious its consequences, how informal the proceeding, or how malicious the motive. Cleavinger v. Saxner, 474 U.S. 193, 199-200, 106 S.Ct. 496, 499-500, 88 L.Ed.2d 507 (1985). Only judicial actions taken in the clear absence of all jurisdiction will deprive a judge of absolute immunity. Stump, 435 U.S. at 357, 98 S.Ct. at 1105; Sullivan v. Kelleher, 405 F.2d 486, 487 (1st Cir.1968).

Cok v. Cosentino, 876 F.3d at 3 (alteration in original).

Plaintiff appears to argue that Judge Sales is not immune because he acted "in the absence of all jurisdiction," Plaintiff's Mem. at 4 (citing Lucarell v. McNair, 453 F.2d 836, 838 (6th Cir. 1972).[3] The United States Supreme Court has made clear that there is a distinction between a lack of jurisdiction and acting in excess of jurisdiction. See Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 1104-05, 55 L.Ed.2d 331 (1978). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject

[3] Pinpoint citation by the court.

to liability only when he has acted in the clear absence of all jurisdiction." Id. at 356-57, 98 S.Ct. at 1105. The court explained the distinction between lack of jurisdiction and excess of jurisdiction by the following example.

> [I]f a probate judge, with jurisdiction over only wills and estates should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

Stump v. Sparkman, 435 U.S. at 357 n.7, 98 S.Ct. at 1105 n.7 (citing Bradley v. Fisher, 13 Wall. 335, 352, 20 L.Ed. 646 (1872)). Here Judge Sales is a municipal court judge with authority over zoning and building code matters. See R.I. Gen. Laws § 45-2-45 (1997 Reenactment). There is nothing in Plaintiff's complaint or in the arguments he has made to date which would allow this court to entertain the possibility that Judge Sales acted "in the absence of all jurisdiction." Stump v. Sparkman, 435 U.S. at 357, 98 S.Ct. 1105.

In light of the foregoing law, particularly the holding in Mireles v. Waco, 502 U.S. 9, 11, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991), that judicial immunity is immunity from suit and not just from ultimate assessment of damages, this court finds that the Motion to Quash should be granted as to Judge Sales.

Turning to the question of whether Plaintiff has shown that he should be allowed to depose Attorney Giorgi, the court finds that Plaintiff has not at this point made such a showing. As a prosecutor, Ms. Giorgi is entitled to absolute immunity for acts taken in the course of her officials duties.

See Imbler v. Pachtman, 424 U.S. 409, 431, 96 S.Ct. 984, 995-6, 47 L.Ed.2d 128 (1976)("[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."); Reid v. New Hampshire, 56 F.3d 332, 337 (1st Cir. 1995)(holding that allegation that prosecutors repeatedly misled trial court in order to conceal their alleged misconduct does not defeat absolute immunity). Accordingly, the court finds that the Motion to Quash should also be granted as to Attorney Giorgi.

Conclusion

The court is not persuaded that Defendants' Motion for Summary Judgment does not involve a pure question of law, namely whether Defendants are immune from suit by virtue of judicial and prosecutorial immunity. The court fails to sees how the depositions of either Defendant could elicit any factual information which would be relevant to the determination of the legal question at issue. Accordingly, the court grants the Motion to Quash. However, in recognition of Plaintiff's pro se status and the fact that he had only a short period of time to respond to the Motion to Quash,[4] the motion is granted without prejudice to the right of Plaintiff to present further argument in support of his contention that he should be allowed to depose Defendants. If Plaintiff does so, he should state specifically why he contends that Defendants are not immune from suit, what he seeks to determine through the depositions, and how such information is

[4] At the hearing on January 13, 2003, the court repeatedly told Plaintiff that it was willing to give him additional time to submit arguments as to why he should be allowed to conduct discovery and that the court would stay the taking of the depositions temporarily pending receipt of Plaintiff's additional arguments. Plaintiff rejected all of the court's offers.

relevant to the determination of the pending Motion for Summary Judgment. See MacKnight v. Leonard Morse Hospital, 828 F.2d 48, 52 (1st Cir. 1987)(finding that "it was not asking too much to require plaintiff to disclose some relevant facts and [the] basis for them before the requested discovery would be allowed.").

For the reasons stated above, the court GRANTS the Motion to Quash.

So Ordered.

ENTER: BY ORDER:

David L. Martin
United States Magistrate Judge
January 21, 2003

Deputy Clerk